VIA ELECTRONIC MAIL

February 6, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building

Re: Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act's Initial Findings and Draft Recommendations

Dear Committee on Resources:

Waterkeeper Alliance submits the following comments in opposition to the National Environmental Policy Act Task Force's Initial Findings and Draft Recommendations which purport to "improve and update" NEPA. Waterkeeper Alliance is a non-profit environmental organization that connects and supports 157 local Waterkeeper programs to provide a voice for waterways and their communities worldwide.

Waterkeeper Alliance rejects the Task Force's assumption that "the statute is procedural and offers no protections above other substantive laws…the NEPA process is something that can be changed to ease costs and delays without undermining other substantive environmental protection laws such as the Endangered Species Act, the Clean Water Act or the Federal Land Policy and Management Act."

No changes to NEPA or to the regulations promulgated by the Council on Environmental Quality and other federal agencies to implement NEPA are warranted nor are they justified. NEPA is one of the nation's greatest success stories and has become an integral part of the environmental landscape. There is no need to overhaul NEPA, for it is a law that when properly implemented saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done properly from its inception. Limiting public involvement and weakening environmental review

will not avoid controversy or improve projects; rather it will erode our participatory democracy. NEPA functions properly and any attempt to alter the statute would undermine its underlying purpose and its function.

I. NEPA is a Bedrock of Environmental Law

The National Environmental Policy Act (NEPA), signed into law by President Nixon 35 years ago, is considered to be the Magna Carta of modern environmental protection as it is the foundation on which most modern environmental laws are based. NEPA safeguards our nation's water, air and lands by requiring federal agencies to provide an assessment of the environmental impacts of, and consider alternatives to, any major federal action that could significantly affect the quality of the environment. Under NEPA, federal agencies must evaluate the impact of that federal action on the environment, consider alternative proposals and seek to minimize harmful effects of the project, disclose the findings to the public, and encourages citizen input into the decision-making process. NEPA guarantees that citizens potentially impacted by the proposed federal action will get the best information about its impacts, a choice of good alternatives, and the right to have their voice heard before the government makes a final decision.

At the core of NEPA is the requirement that alternatives must be considered, including those that will minimize possible damage to public health, environment and the quality of life. NEPA also allows citizens to have opinions heard before the agency makes its final decision about the viability of a project. Because NEPA ensures the public remains informed and that alternatives are considered, NEPA has allowed communities to reconsider, improve, or halt projects that would have otherwise resulted in harm.

Legislative History

The sponsors of the National Environmental Policy Act of 1969 (NEPA) had no doubts about its importance.[1] Warnings of environmental crises fill NEPA's legislative history, reflecting a feeling that "we cannot continue on this [environmentally

[1] 42 U.S.C 4321-4347

destructive] course…[for o]ur natural resources…are not unlimited."[2] Senator Jackson, NEPA's key supporter, called the Act "the most important and far-reaching environmental and conservation measure ever enacted…" and hoped the Act would help avert an otherwise inevitable environmental catastrophe.[3]

NEPA declares it a national policy to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 43 USCA 4321. NEPA requires that federal agencies understand the complexity of environmental connections, and how the impacts of one action exacerbate, modify, or increase the impacts of other existing projects or actions. Federal agencies are required to seek to understand the environmental connections between agency plans and all past, present, or reasonably foreseeable future actions that may affect he same environmental resources.

Among NEPA's goals were the early identification of environmental consequences of government action and the understanding of government proposals in a larger environmental context. As a result of the "failure to formulate a comprehensive national [environmental] policy," reported the Senate Interior and Insular Affairs Committee, "[e]nvironmental problems are only dealt with when they reach crisis proportions…Important decisions concerning the use and the shape of man's future environmental continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."[4] Senator Jackson wanted NEPA to "prevent…environmental abuse and degradation caused by Federal actions before they get off the planning board."[5] Thatcher, Terence L., Understanding Interdependence in the Nation Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act.

NEPA has only been amended twice in history, and there is absolutely no conceivable reason articulated by the Task Force that could warrant further revisions.

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[2] S. Rep. No. 296, 91st Cong., 1st Sess. 5 (1969).
[3] 115 Cong. Rec. 40,416 (1969).
[4] S. Rep. No. 296, *supra* note 2, at 5.
[5] 115 Cong. Rec. 29,0555 (1969).

First, it was amended to allow states to prepare environmental analysis, and second, it was amended to make changes regarding administrative matters of the Council on Environmental Quality.

The foundational objectives of NEPA are as relevant today as when Congress passed it in 1969. NEPA paved the way for the implementation of a wave of environmental laws, including the Clean Air Act, Clean Water act, Endangered Species Act, Comprehensive Environmental Response, Compensation and Liability Act, and Resource Conservation and Recovery Act.

II. The Task Force has Failed to Articulate any Rational Justification for Amending NEPA

The Task Force's Initial Findings and Draft Recommendations are based on an unsupported and obviously pre-determined supposition: that NEPA is a broken process that needs to be fixed. Yet, instead of an objective examination of NEPA, the Task Force offers a slanted perspective that offers a myriad of baseless and conclusory statements on how NEPA has created an unwarranted burden on industry and regulatory agencies. However, as detailed below, none of the Task Force's rationales for backpedaling on NEPA protections is justified.

A. Intent of NEPA

From the onset, Waterkeeper Alliance must note that the question of whether NEPA is primarily procedural vs. substantive is largely irrelevant to an analysis of the past successes enjoyed under the statute. Though the Task Force recognizes that "NEPA has become an integral part of the environmental landscape," it points out that the view that "NEPA may be the only tool that grassroots groups have [to fight highway projects]" is "obviously contrary to the intent and current interpretation of NEPA." As detailed above, NEPA was enacted to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . ." When projects are proposed that, by their very nature, cannot meet the demands of NEPA, NEPA does serve as a tool to halt environmentally destructive projects or force the action agency to alter plans to reduce harmful impacts. This fact

does not, however, undercut the validity or importance of the statute; to the contrary, NEPA is working optimally when the process serves to force alterations and modifications to environmentally damaging projects.

B. Reasons for and Concerns about Modifying NEPA

The Task Force cites comments regarding cost of compliance, delays and cancellations of projects, and uncertainty in the public participation process to support its conclusory finding that "these reasons sustain a call for modest changes to NEPA or its regulations." Waterkeeper Alliance notes, however, that none of the reasons cited above have any objective support in the Task Force Draft Recommendations. Certainly, self-serving statements made by those who carry out the very projects that NEPA is intended to improve do not provide a viable justification for changing the statute.

Equally unsupported is the Task Force's claim that the governmental "state of affairs" that gave rise to NEPA has sufficiently improved over the past 30 years to now allow a weakening of NEPA's procedural safeguards. Tellingly, the Task Force fails to offer any evidence for this statement and Waterkeeper Alliance views with skepticism the position that the day of the "myopic, dishonest and dumb" government making decisions that necessitated the enactment of environmental protection laws like NEPA are long past. Though the Task Force may have difficulty understanding "how the government would retract or retreat into pre-NEPA practices if the statute were to be amended," Waterkeeper Alliance does not share its optimism, particularly given the current administration's vigorous attempts to gut literally every environmental protection statute on the books today. There is no indication that current governmental considerations for sound environmental protection policies is any better now than it was in the 1960's and Waterkeeper Alliance sees no reason to place its faith for diligent environmental protection in the hands of a government which has overtly displayed its ready willingness to sacrifice environmental health for industry profits.

C. Litigation

Though the Task Force is forced to concede that "there is relatively little in the way of NEPA lawsuits as a percentage of the total number [of] EISs filed each year," it

attempts to salvage its position by claiming that simply the threat of litigation is having some unspecified detrimental impact on projects and planning. Such an argument makes no sense for several reasons.

The threat of NEPA litigation is minimal; as the Task Force points out, of the 50,000 EIS's filed each year, only 0.2% result in litigation. The fact remains (and the statistic supports it) that if those involved in project planning properly adhere to NEPA guidelines, then litigation is not a viable threat. Yet even after acknowledging the minimum occurrence of NEPA litigation the Task Force goes on to explore options to reduce the amount of litigation below its 0.2% "while not excluding any legitimate claim." What the Task Force fails to do is establish that any of these minimal NEPA claims were illegitimate in the first place. The Task Force's position also conveniently ignores the fact that the Court system already has the means to dismiss "illegitimate" claims as "frivolous" if is so chooses. In short, the Task Force is suggesting that Congress amend a statute to address a problem that does not exist (i.e., a non-existent abuse of the Court system).

D. Federal, Tribal, State and Local Entities

The Task Force cites conflict and a lack of coordination among Federal agencies and Tribal frustration with the NEPA process as basis for amending the statute. Waterkeeper Alliance, however, does not believe that the responsibility of complying with public health and environmental protection laws should form a rationale for weakening standards. There is nothing currently contained in NEPA that inherently creates a "significant lack of coordination in the NEPA process among Federal agencies'" nor, given the fact that 50,000 EIS's are crafted each year, is there anything contained therein which produces an "inability to navigate the NEPA process for oil and gas permitting." As stated above, NEPA creates several important procedural safeguards for environmental protection. A general unwillingness to adhere to NEPA requirements by the regulated community cannot dictate a lowering of standards.

E. NEPA and Other Substantive Laws

The Task Force is rightly concerned with duplicative and redundant environmental analyses under NEPA and other environmental protection statutes. What it fails to note, however, is that Courts have and do entertain agency arguments that environmental impact studies under one statute can serve to fulfill requirements under other statute.[6] Waterkeeper believes that whether satisfaction of NEPA or the ESA or any other applicable statute is attained by compliance with other statutes is best achieved during a careful examination of the specific facts of each case, on a case-by-case basis, and not through a blanket codification. The current NEPA process allows this to happen in a proactive, public forum that we believe actually reduces the potential for later surprises or duplicative analysis.

F. Delays in the NEPA Process

Waterkeeper gratefully acknowledges that NEPA demands that action agencies are forced to take a cautious approach in assessing whether major federal projects will have any significant environmental impacts. As technological and scientific principles of cause and effect relationships become better known, it is inevitable that EIS's will become more complex and involved. Indeed, in several areas of environmental impact assessment, like coal production and use, we are just now learning the true cost of potential harmful activities. Waterkeeper Alliance, unlike the Task Force, does not view the increasing complexity and thoroughness of environmental assessment as a basis for weakening current standards.

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[6] "As we recognize with regard to the requirement that the agency prepare an EIS, "compliance with NEPA's ... requirements has not been considered necessary when the agency's organic legislation mandates procedures for considering the environment that are 'functional equivalents' of the [NEPA's] process." *Izaak Walton League of Am. v. Marsh*, 210 U.S. App. D.C. 233, 655 F.2d 346, 367 n.51 (1981). The rationale for the functional equivalence doctrine is the well-established principle that a "general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989); see also *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 504-05 (11th Cir. 1990) (citing cases). The NEPA is the general statute requiring agencies to consider environmental harms, whereas the Clean Air Act is the more specific and its equivalent provisions apply in place of those in the NEPA. See *Portland Cement*, 486 F.2d at 386 (finding functional equivalence when more specific statute strikes "workable balance between some of the advantages and disadvantages of full application of NEPA")."

The Task Force also fails to note that many NEPA delays can result from action agencies trying to avoid NEPA compliance by conducting environmental assessments instead of full-blown environmental impact statements even when they know that the planned project will have significant environmental impacts, or by improperly conducting EIS's by attempting to take shortcuts and ignoring relevant factors. Once again, the Task Force is misplacing blame when it cites the need to perform supplemental EA's and EIS's when action agencies fail to conduct proper studies in the first place. Instead of curtailing NEPA demands to suit action agency unwillingness to adhere to the process, the Task Force should be examining ways that action agencies can act more responsibly when it comes to NEPA compliance.

G. NEPA Compliance Costs

The Task Force cites the rising costs of producing EIS's as a basis for amending the statute and claims that these costs "are associated with the amount of information required to address potential litigation." However, there is no support in the Task Force's Draft Recommendations which support a finding that the rising costs of EIS's have anything to do with preparation for litigation, and given the 0.2% litigation rate cited earlier in the report, Waterkeeper Alliance doubts the correlation between the two. Instead, the increased costs of NEPA compliance are more likely the result of increasing complexities of environmental assessment as environmental scientist become more aware of the harmful impacts of many proposed projects. Waterkeeper feels that those who seek permits for major projects should fund the cost for proper environmental assessment.

NEPA has lived up to the expectations of its sponsors as it has become integral to maintaining balance and common sense where environmental decision-making is concerned. NEPA is the best tool citizens have to learn how federal projects may affect them and the best tool the federal government has to examine the proposed projects and obtain public input. NEPA saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done right the first time.

NEPA is the guarantee that Americans affected by a federal action will get the best information about its impacts, a choice of good alternatives, and the right to have their voices heard before the government makes a final decision. NEPA ensures balance, common sense, and openness in federal decision-making; it is an effective tool to keeps

the government in check as it pursues major action. NEPA's promise of project review and public involvement must be safeguarded, not sacrificed in the name of expedited rubber stamping of major federal actions at the expense of communities and the environment.

III. Several of the Task Force Recommendations Would Severely Undermine the Integrity and Effectiveness of NEPA

The Task Force's draft report of initial findings recommends weakening NEPA in several profound and fundamental ways.

Addressing delays in the process

Proposal 1.1 purports to redefine the term "major federal action" by limiting it to "new and continuing projects that would require substantial planning, time, resources and expenditures" which, in effect, would limit the types of actions subject to NEPA review. "Major federal action" must not be amended or redefined. Existing regulations adequately and effectively focus agency attention on a federal action's potential to have a significant impact on the environment. The proposed recommendation disregards the core question contemplated by NEPA, which is whether the federal action in question would have a significant impact on the quality of the human environment. The proposed definition diverts that focus to other characteristics of the federal action, like cost and time, which may have no relationship to the action's environmental impacts. Understanding of the concept of what constitutes a "major federal action" has been articulated by current and substantial case law. The newly proposed definition also suffers from ambiguity in that the term "substantial" is undefined and open to broad interpretation.

Proposal 1.2 attempts to amend NEPA by adding mandatory time lines for the completion of NEPA documents. Waterkeeper Alliance cannot support or endorse mandatory timelines for the completion of NEPA documents including an EA, EIS or

completion of the entire NEPA process. It is contrary to the holistic nature of the NEPA process and analysis to declare an incomplete NEPA analysis as complete when no public documents have been released nor public comments made. The very purpose of NEPA, to generate a substantive and holistic understanding of all the implications and consequences resulting from the development of the project in question, would be undermine should arbitrary time limits be set.

Proposal 1.3. Waterkeeper Alliance cannot support this recommendation which proposes to amend NEPA to create "unambiguous criteria for the use of Categorical exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS)." Existing laws provide clear direction for classifying activities for different levels of environmental review. This proposal wrongly assumes that all temporary actions produce minimal effects. It violates the central purpose of NEPA by imposing a rigid burden on agencies and the public when they seek to uncover the possible environmental effects of particular actions. NEPA should not be amended to state "temporary activities or other activities where the environmental impacts are clearly minimal are to be elevated under a CE." This offers the agency the unmonitored discretion to opt "to utilize another process."

Proposal 1.4 seeks to amend NEPA to limit the supplemental documentation unless a specific showing is made. Waterkeeper Alliance does not support the codification of criteria for the use of supplemental documentation that would limit the universe of useful information that may bear on the merits and substance of the proposal being considered and evaluated using the NEPA process. Placing a blanket limitation on supplemental documentation also takes away the right to exercise their discretion and expertise from participating agencies when overseeing potentially harmful projects.

Public Participation

While the report acknowledges that public participation is fundamental to NEPA's success, the Task Force has made several recommendations that dramatically limit who, when, and how the public can participate in all levels of the NEPA process. Setting

limits on public involvement and our right to address harmful projects or reducing adequate review of major projects will not avoid controversy or improve projects, rather it will result in expeditious approval of projects that may not necessarily reflect the needs of the community or reflect the best use of the land. Waterkeeper Alliance is opposed to any reductions in public participation in federal planning.

Proposal 2.1 seeks to direct CEQ to prepare regulations giving weight to localized comments. Waterkeeper cannot support any initiative that affords more weight to comments based on geographic location.

Proposal 2.2 would amend NEPA to codify the EIS page limits set forth in 40 C.F. R 1502.7. Waterkeeper Alliance is opposed to any setting of limits on the length of an EIS. A comprehensive EIS must not be limited to a certain number of pages. An EIS must be as long as it needs to be in order to respond to the project and the region the project will impact.

Better Involvement for state, local and Tribal stakeholders

Proposal 3.2 seeks to direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. NEPA is a federal statute instructing federal agencies. Handing off this responsibility and the associated costs to the states is not in keeping with the law's intent. Waterkeeper Alliance does not support amending of CEQ regulations to allow state review processes to satisfy NEPA requirements.

Addressing litigation issues

Proposal 4.1 NEPA need not be amended to include alternative suit provisions. This time honored right of a citizen to bring suit is well delineated under current judicial

review procedures under the Administrative Procedure Act and numerous court rules. Standing has been defined by the federal courts and should be left to judicial precedent.

Proposal 4.2 would amend NEPA to add a requirement that agencies "pre clear," effectively restricting who, when and how the public can challenge agency decisions that impact public health and communities. Waterkeeper Alliance is opposed to the creation of provisions mandating when and who can appeal decisions which would reverse the burden of proof from agencies to the public and forces agencies to favor business interests in settlement agreements. This proposal places significant restrictions on a citizen's ability to participate in the public process and to challenge an agency's decision-making process. The result would be sloppy decision-making, increased litigation, and frustration from all segments of the public.

Clarifying alternative analysis under NEPA

Proposal 5.1 purports to amend NPEA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are "economically and technically feasible." Because it would shift the alternatives analysis in favor of corporate interests that can fund expensive studies, Waterkeeper Alliance is opposed to any attempt to limit analysis to those documents supported by feasibility and engineering studies. Few citizens groups or organizations have access to the technical or financial resources to prepare such studies while industry generally has adequate resources to do so. In addition, the feasibility of any alternative is already contemplated by use of the term "reasonable."

Proposal 5.2 proposes to amend NEPA to "clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project." Waterkeeper Alliance opposes this recommendation because it would insert an entirely new set of issues into the NEPA analysis requirements by requiring the consideration of a new category of impacts. This proposal also seeks to mandate that agencies reject the 'no action alternative' if a new, vague and undefined balancing test is

not met. This removes an agency's ability to evaluate the full range of options independently and could compel a project to proceed even if it is overwhelmingly opposed by the public.

Proposal 7.2 directs CEQ to control NEPA costs, however Waterkeeper Alliance does not support a statutory ceiling on associated NEPA costs. A thorough comprehensive review may require expenditure of time, capital and resources, but it is a fundamental requirement of NEPA that these reviews be comprehensive.

Clarifying the meaning of "cumulative impacts"

Proposal 8.1 would amend NEPA to "clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts" which would in effect introduce confusion regarding how agencies evaluate cumulative impacts. It would allow "an agency's assessment of existing environmental conditions" to serve as the "methodology to account for past actions." This proposal is susceptible to distinctly different interpretations, one of which would run the risk that agencies minimize or ignore the impacts of prior actions. Waterkeeper Alliance rejects this recommendation, for it would serve as a cover up for previously conducted projects, wiping the slate clean of responsibility for previous harm done to the environment.

Proposal 8.2 would "Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis". This proposed amendment would restrict an agency's ability to consider future impacts. Proposal 8.2 would limit analysis of future impacts to "concrete proposed actions" rather than those that are reasonably foreseeable.

IV. Conclusion

At its most basic and fundamental level, NEPA is about facilitating an informed democracy. NEPA is the guarantee that citizens affected by a major federal action will get the best information available about its impacts on their community and environment, a choice of good design alternatives to minimize damage, and the right to have our voice heard before the government makes a final decision. Cutting corners can and will have disastrous consequences, especially when it comes to spending taxpayer money on projects that might harm citizens or their environment. Limiting public involvement and weakening environmental review will not avoid controversy nor will it improve projects.

NEPA, as it is presently drafted, ensures balance, common sense and fosters openness in federal decision-making. The recommendations by the Task Force to amend NEPA and embark on drastic regulatory changes represent a overt and unwarranted attempt to undermine the integrity and efficacy of NEPA.

Sincerely,

<< ss. Steven Fleischli >>

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